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August 4, 2008

Director Risenhoover
Office of Sustainable Fisheries
1315 East-West Highway, SSMC3
Silver Spring, MD 20910

Via e-mail to: nepaprocedures@noaa.gov

Dear Director Risenhoover:

The Northwest Atlantic Marine Alliance (NAMA) submits these comments relative to the proposed rule recently issued by the National Marine Fisheries Service (NMFS) to implement the provisions of the Magnuson-Stevens Reauthorization Act (MSRA) addressing integration of the National Environmental Policy Act (NEPA) and fishery management processes [73 Fed. Reg. 27998 (May 14, 2008); 16 U.S.C. § 1854(i)(1)]. NAMA is committed to supporting local fishing communities in New England and the Northeast in their efforts to revive ailing marine ecosystems and recover healthy fisheries. We are supportive of community based fishermen, anchored in a history and geography of fishing fertile waters of the Northwest Atlantic, who seek sound scientific information to add to their own breadth of knowledge of the marine environment in order to develop plans and actions that will recover and sustain a fishery ecosystem that can support themselves and future generations of local fishermen. Careful and effective implementation of the MSRA and effective incorporation of NEPA are key to this goal.

NMFS should withdraw the proposed rule

Although the Magnuson-Stevens Fishery Conservation and Management Act was re-authorized and Congress directed NMFS to update its environmental review procedures for compliance with NEPA, the proposed rule does not accomplish that and serves only to weaken NEPA in the context of the MSA. The failures are so significant that the best course is to abandon this rule and start over.

Contrary to the claim that the new process would cause the Fishery Management Councils (FMCs) to be more attentive to environmental impact review and provide more opportunity for public input, the rule actually is an abrogation of NMFS' legal responsibility to implement NEPA reviews. It provides an avenue for the councils to circumvent such reviews and provides ample opportunity for reducing public participation by significantly reducing the required response time.

In the lengthy preamble, NMFS suggests that the councils are composed of balanced representatives from a wide variety of viewpoints and expertise, but in reality they are composed of politically appointed members, many of whom represent big industrial fishing interests. NAMA strongly opposes the removal of responsibility for environmental review from the hands of NMFS scientists and other trained experts into the hands of highly politicized non-federal advisory bodies limited in scientific expertise and laden with personal agendas. It is a dereliction of NOAA's obligation to conduct environmental reviews in accordance with NEPA, which requires that the assessment and solicitation of, receipt of, and response to public comments be conducted by a federal agency. If adopted, this proposal would undermine the implementation of NEPA to the detriment of fishery management, ocean ecosystems, and fishing communities. As suggested at the end of this letter, there is certainly a better way to comply with the mandate to update the environmental review process in the context of NEPA and the MSA.

The problems with the proposed rule

Problems with allowing FMCs to share responsibility for NEPA. The rule incorporates an illegal delegation of NEPA responsibilities to the councils, which are non-federal advisory bodies, and thereby gives them a degree of control over the outcome of environmental review inconsistent with NEPA. In addition, NMFS should retain the authority to set time limits for fishery management actions; be solely responsible for seeking and receiving comments from the public on draft and final EISs; and, be responsible for responding to comments and writing the final EIS. While it is appropriate to confer with the relevant council and encourage their contribution to the information and their participation in the process, the full responsibility for the final product rests only in the hands of NMFS – and it should stay that way.

While NAMA is most concerned about the New England Fishery Management Council, and we believe there have been adequate numbers of examples to illustrate the Council will exert power over selection of alternative management options and decisions and may ignore environmental impact analyses, we are also aware that other Councils should not be given unusual and illegal responsibilities over the environmental review process and selection of alternatives. A better procedure for incorporating NEPA is essential. We believe that the proposed rule offers opportunities and creates ambiguities that will encourage the councils to have undue influence over the environmental review process and use it to their own ends, which are not always in the best interest of the marine ecosystem and local fishermen and their communities.

Problems with creating new environmental documents. There is nothing wrong with the usual NEPA environmental documents: EIS (environmental impact statement), EA (environmental assessment) and FONSI (finding of no significant impact) with clear public review procedures. There is no need or reason for creating additional types of documents or substituting new processes for those that are tried and true. Furthermore, new types of documents will have to have new guidelines and the entire review system will be confusing if not inadequate. In particular:

- IFEMS (integrated fishery and environmental management system) is not an acceptable alternative to EIS and EA documentation, because while similar to the standard NEPA documents, they vary in important ways including production and public review

procedures, timing, responsible bodies, scheduling of public review hearings if any, completeness of information, and consideration of cumulative impacts so critical in fishery management decisions.

- Framework Compliance Evaluations are an entirely unacceptable alternative to NEPA environmental review process. An internal decision by NMFS that a proposed action is already covered by previous documents leaves the public entirely out of the decision making process.
- Categorical Exclusion (CE) is not needed or in any way desirable. The situations described as warranting CEs can usually be handled sufficiently by the standard NEPA review process. The lack of severe restrictions on the use of CEs offers an opportunity for circumventing standard environmental assessment procedures in situations when they provide no obstacle to effective decision-making.
- Placing arbitrary length restrictions on complex environmental review documents is also unacceptable. While it is always helpful to reduce repetition and to be clear and concise in wording, there is no excuse for avoiding complicated information and relationships. Thoroughness is to be encouraged every step of the way.
- MFCs should not have the authority to recommend alternatives entirely outside the scope of the environmental review. If they add an alternative, it should be vetted with the same procedures as all other alternatives.

Problems with new time limitations and new procedures for public review

- Allowing the councils to issue environmental reviews for comment, to accept public comments and/or to schedule hearings on documents in the context of council meetings is absolutely unacceptable. There is no reason to believe that councils would give public comments careful review nor would they be equitable in their consideration of all comments received. The effect would be to shut some or much of the public out of the process. NMFS should handle the comment procedure from beginning to end.
- A fourteen-day period for public review of environmental documents, including complex EISs or IFEMS, would in practice shut out many fishermen and other citizens who would want to comment and would potentially have important input. While the rule sets out standard comment periods of 45 and 30 days for environmental documents (draft and final IFEMS), and it prescribes guidelines for circumstances under which a shortened comment period would be allowed, there are no guarantees that the shorter period of 14 days would not be used too often or could become the standard procedure. Furthermore the FMCs are given some discretion in this matter, which is unacceptable under NEPA.
- NMFS and the Secretary of Commerce are given the authority to shorten the time for making a final ruling on a fishery management action to as short a period as 15 days from some ill-defined point but clearly prior to the completion of a final environmental document or immediately upon release of the final IFEMS, without allowing public

comment on the alternative selected for the Secretary's decision. It is far too easy to cut off public input on a final management decision. These provisions are contrary to NEPA and unacceptable alterations to the public review process.

Strengthen, don't weaken, the implementation of NEPA in the context of MSA

NMFS should retain control of environmental review and strengthen its own procedures by guaranteeing independence to NOAA scientific review teams. EISs should utilize and document the best science available, consider impacts of alternative management actions on entire ecosystems, encourage public and fishing community participation in the EIS scoping process, make it difficult for the councils to ignore scientifically sound analyses, and require that decisions contrary to or outside the NMFS analyses be justified with equally rigorous and scientifically defensible reviews.

To coordinate the NEPA process with the requirements of MSA doesn't allow turning over complicated and objective scientific analyses to biased parties. It requires that the analyses be done by the federal agency and that they incorporate the best available science and fishery knowledge, complex ecosystem analysis, and a precautionary approach that takes into account inevitable uncertainties.

Finally, NMFS should have a process by which it makes sure all reasonable alternatives and their environmental impacts are considered in an EIS. Some of these alternatives may be suggested from the public, fishermen and their organizations, or others outside NMFS and the council. Councils should not have the authority to reject consideration of alternatives deemed reasonable by an objective NMFS process. Councils have often rejected alternatives aimed at complying with the affirmative conservation provisions of the MSA as impracticable and omitted them from the range of alternatives. NMFS should involve the relevant FMC but should not give them the authority to do the agency's job.

Yours truly,

A handwritten signature in black ink, appearing to read "Niaz Dorry", enclosed within a simple, hand-drawn oval shape.

Niaz Dorry
Coordinating Director

CC: Congressional delegation
New England Fisheries Management Council